Petition not printed

In the

Supreme Court of the United States

October Term, 1948

No. 544

RENE DE MEERLEER, Petitioner,

v.

THE PEOPLE OF THE STATE OF MICHIGAN

On petition for a writ of certiorari to the Supreme Court of the State of Michigan

BRIEF IN BEHALF OF THE STATE OF MICHIGAN

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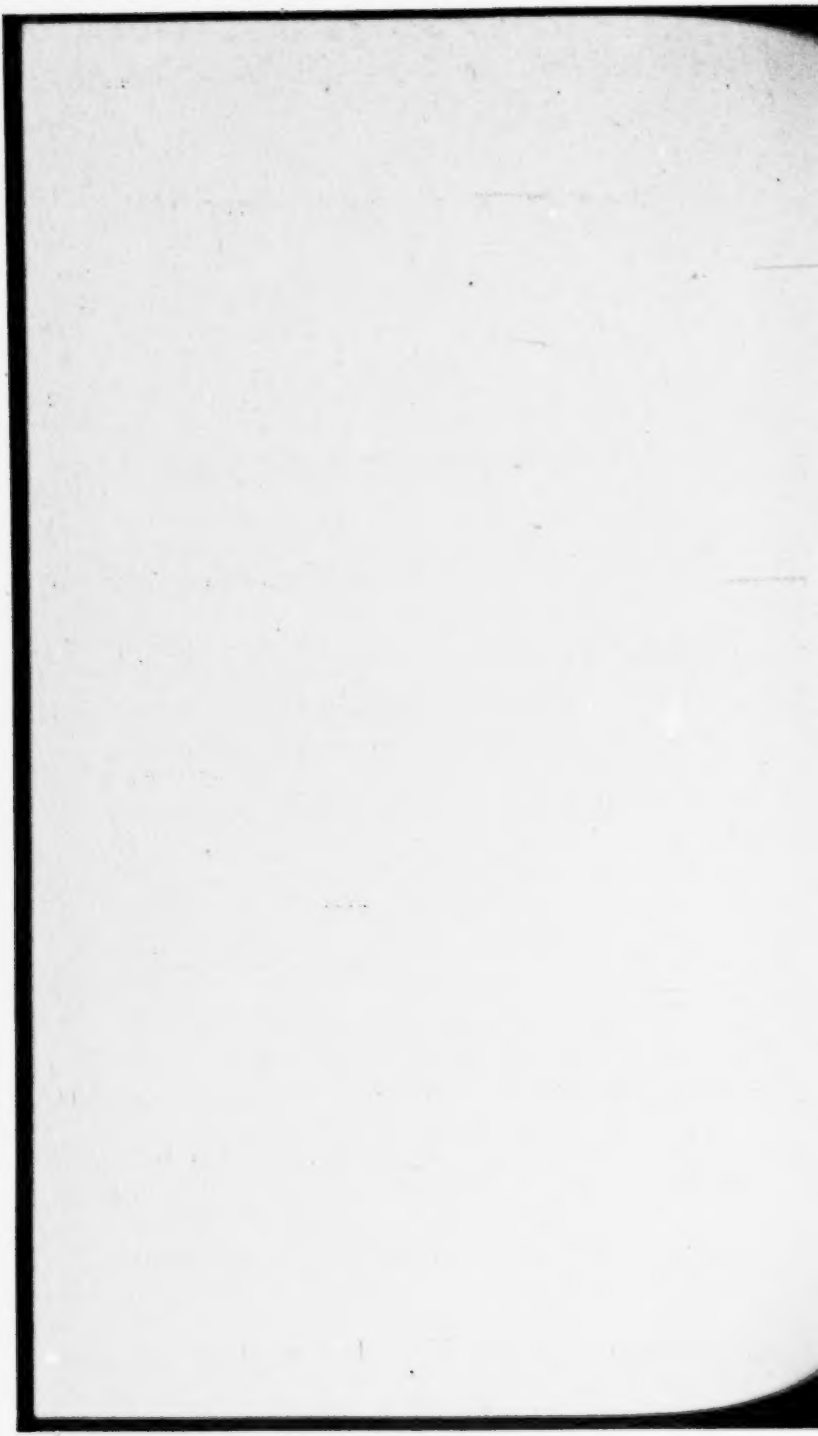

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BRIEF IN BEHALF OF THE STATE OF MICHIGAN

Introduction:

This brief is filed for a three-fold purpose: (1) to oppose the petition for certiorari; (2) to support our motion, heretofore filed and held in abeyance at our request, for leave to document our brief with a certified transcript of the petitioner's testimony given in his defense on the occasion of his second trial; and (3) to oppose petitioner's motion to be enlarged on recognizance.

I

Opposing Petition for Certiorari

1

Opinion of Court Below

The opinion of the court below is officially reported as *In re De Meerleer*, 323 Mich. 287, and it appears unofficially in 35 N.W. 2d 255. Counsel is correct in stating that an opinion handed down by the Michigan Supreme Court on the same day, *In re Doelle*, 323 Mich. 241, 35 N.W. 2d 251, was deemed to control the questions presented by counsel for *De Meerleer*, though it should be noted that the case of *Doelle* was received on briefs about 5 weeks before the cause of *De Meerleer* was argued.[1]

2

Counter-Statement on Jurisdiction

Since the judgment of the court below was entered on December 17, 1948, the petition for certiorari was filed within the prescriptive period, 28 U.S.C. § 1257(3).

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[1]

These two cases were considered by the court as involving much the same basic problem. Although, as counsel observes in his second note, Doelle appeared in propria persona and submitted very informal, prison-made papers, whereas De Meerleer was represented by counsel who filed exhaustive briefs and argued the case vigorously, the Michigan court gave to Doelle the same painstaking thought as they accorded De Meerleer, whose counsel was served with a copy of the State's brief in the Doelle case and who filed a supplemental brief in reply thereto.

It is our position:

1. The judgment of the court below, as was the sentence which it sustained, is based upon non-federal grounds adequate to support it, *viz.*, that the length of imprisonment for a specific felony is a matter for legislative determination and is not subject to judicial supervision unless the sentence imposed violates the provisions of the statutes. Whether or not statutes should be so amended that a prisoner who had served time under a void sentence should be credited therewith on a new sentence, is a matter for the legislature, not the courts, *In re Doelle*, 323 Mich. at 248-249, 35 N.W. 2d 251.[2] Otherwise, we respectfully submit, solution of the problem is for the Governor of the State, who possesses exclusive power to commute the sentence or pardon the culprit, Mich. Const. 1908, art. VI, § 9.

2. Under the indeterminate sentence law of Michigan,[3] "the maximum penalty provided by law shall be the maximum sentence in all cases except as herein provided[4] and shall be stated by the judge in passing sentence",

who after ascertaining and considering facts and circumstances, "tending to indicate briefly the causes of the criminal character or conduct of such convict" (note 3),

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[2]

This Court has recently expressed the thought that "the forum for the correction of ill-considered legislation is a responsive legislature". Daniel v. Family Security Ins. Co., No. 297 October Term, 1948, decided February 28, 1949, see p. 5, slip opinion.

[3]

Mich. Code of Criminal Procedure, chap. 9, § 8; Comp. Laws of Mich. 1948, § 769.9; Mich. Stat. Ann. (Henderson) § 28.1080.

[4]

Such exceptions are not perinent here.

fixes a minimum term. The statutory maximum is mandatory,[5] the minimum fixed by the trial judge is discretionary,[6] and there is no statutory provision which empowers a trial judge to credit on a sentence imposed by him, the equivalent of time already served by the defendant upon a prior void sentence that has been vacated by the Supreme Court of Michigan on an appeal sought by the defendant, or by this Court on certiorari obtained by him.[7]

Hence, under the indeterminate sentence law of Michigan (note 3), when a difficult problem such as this confronts the trial judge, the solution lies wholly within his discretion, and it is for him to say in circumstances such as these, after giving due consideration to the fact *(among others)* that the convict has already served a long period of time on a prior sentence and judgment later found to be void, what the minimum term shall be. Counsel is absolutely right in stating in his petition to enlarge petitioner upon recognizance, that "Michigan provides no redress against the State to compensate for illegal confinement". The fault, if any, lies in the legislative enactments of the State, and since the petitioner in this cause did not in the courts below draw in question the validity of any Michigan statute, as tested by the Constitution of the United States, he cannot press the question here.

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[5]

A provision in a judgment (sentence) for a different maximum term is a nullity. Canfield v. Commissioner of Pardons & Paroles, 280 Mich. 305.

[6]

Here, the minimum term imposed was 6 months, which was strongly recommended, and it is our contention that this constituted no abuse of judicial discretion.

[7]

Counsel for the petitioner in the court below, counsel for the State, and the Michigan Supreme Court itself, sought in vain for any such provision.

3

Questions Presented.

We cannot accept the premises on which counsel for petitioner bases his statement of the questions presented:

The problem, as we view it, presents for decision the following questions:

First: Where an accused person on plea of guilty has been convicted in a Michigan court of murder in the first degree and sentenced therefore to life imprisonment;[8] where, after 14 years or more of such penal servitude, upon the defendant's petition for certiorari duly granted by this Court, 329 U.S. 702, No. 140, October Term, 1946, such judgment is reversed as void for lack of that fundamental fairness essential to due process of law, 329 U.S. 663; where, upon second trial for murder involving the same criminal act, the defendant by verdict of a jury is duly convicted of the lower-grade offense of manslaughter; where the trial judge, pursuant to Michigan's indeterminate sentence law (note 3), having considered the length of time already served by the defendant, and all other facts and circumstances which appear pertinent in the case, including the fact that the defendant in his testimony acknowledged that in effect he "took a human life and the life of a man who was apparently an honest, God-fearing citizen, for candy

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[8]

Mich. Penal Code, § 316; Mich. Comp. Laws 1948, § 750.316; Mich. Stat. Ann. (Henderson) § 28.548, et seq.

and gasoline",[9] and in the exercise of judicial discretion, imposes upon the defendant a minimum prison term of 6 months, states the maximum term prescribed by law[10] to be 15 years,[11] but strongly recommends that the defendant upon termination of such minimum term of 6 months, less good-time, be released on parole in order that he may be subject to close supervision and guidance deemed by the trial judge essential both for the protection of the public and for defendant's rehabilitation in a free society;[12]

> **(1)** Does such a sentence so imposed in accordance with the mandate of Michigan law as interpreted by her highest court, and in the exercise of permissible judicial discretion, deny to such a defendant that due process of law which is guaranteed by the Fourteenth Amendment to the Constitution of the United States?

---

[9]

The quotation is from page 14 of the transcript of proceedings had before the trial judge when defendant was sentenced, such transcript being attached to the return to writ of certiorari issued by the court below. The judge added: "That is under your own story, and it is not a pleasant thing to contemplate". The undisputed facts, and they were undisputed, 329 U. S. at 664, are related in summary fashion in 313 Mich. 550-551. And we have requested the Court to permit us to file a transcript of petitioner's own version.

[10]

Mich. Penal Code, § 321; Mich. Comp. Laws 1948, § 750.321; Mich. Stat. Ann. (Henderson) § 28.553.

[11]

Michigan's indeterminate sentence law, note 3, provides inter alia that "the maximum penalty provided by law shall be the maximum sentence in all cases except as herein provided and shall be stated by the judge in passing sentence".

[12]

The trial judge was deeply impressed by the necessity for such strict supervision, in view of defendant's instability and the resultant danger to members of the public should he be released without any restraint.

(2) Is the prohibition of double jeopardy in the 5th Amendment applicable against state action by force of the 14th Amendment to the Constitution of the United States, and is such a defendant thus subjected to be twice put in jeopardy of life and limb?[13]

(3) If the prohibition of cruel and unusual punishment in the 8th Amendment is applicable against state action by force of the 14th Amendment to the Constitution of the United States, is such a defendant thus inflicted contrary thereto?

Second: Is the judgment of the court below, based upon a non-federal ground adequate to support it?

4

Counter-Concise Statement of the Case

We correct the following inaccuracies and insufficiencies in petitioner's "Statement":

1. The third paragraph thereof, p. 4, is insufficient to acquaint the Court with the nature of the proceedings which led to imposition of sentence, especially those factors of the problem which the trial judge considered in fixing the minimum term at 6 months, and in recommending parole under strict supervision upon termination thereof.

---

[13]

The answer, we think, will be found in Palko v. Connecticut, 302 U. S. 319, which has never been overruled, and in Francis v. Resweber, 329 U. S. 459, 462.

We, therefore, supply the following:[14]

Although the document does not appear of record, we are informed, and counsel will agree that on day of sentence, petitioner filed with the trial court certain objections "in arrest of judgment" alleging, among other things, that because of the time already served upon the prior void judgment, imposition of sentence in the case at bar would constitute cruel and inhuman punishment and double jeopardy contrary to the 5th and 8th Amendments to the Constitution of the United States, and a denial of due process of law in violation of the 14th Amendment. It was also averred, in effect, that such sentence was barred by the Michigan statute of limitations.

In open court, however, it was the latter point which was stressed by counsel for the defendant rather than the constitutional claims now advanced.

After considerable colloquy between court and counsel, the trial judge overruled defendant's objections in arrest of judgment, and it will be noted that it was the trial court himself who first made reference to the objection that the fact that defendant having served more than the maximum sentence permitted by law for manslaughter "would be an absolute bar to disposition of the case through sentence by this Court", and he expressed the opinion that he should give serious consideration to that fact, although as a matter of law such a state of facts did not preclude the court from disposing of the case by sentence, just as might be done in any other similar case.

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[14]

See, particularly, the transcript of such proceedings, attached to the return of the circuit judge in compliance with the ancillary writ of certiorari issued by the court below.

All of which appears from the transcript of such proceedings attached to and made a part of the return to the writ of certiorari issued by the Supreme Court of Michigan to the trial judge.

That transcript also reveals that when the petitioner was called upon to state any reason he might have why sentence should not be imposed, his counsel made the following statement on the record:

> "MR. LOUISELL: All I might add, your honor, your honor has already taken notice of the length of time this man has served, as your honor aptly and appropriately puts it, for the same acts out of which this violation of law arises.
>
> "Your honor is certainly cognizant of the language in People vs. Farrell, to the effect that the court would take into consideration any time that a prisoner had served under an illegal or void sentence, and reimposing of sentence.
>
> "Your honor has had available to you, I presume in connection with the probation report, this man's record at Jackson and Marquette prisons throughout these past 15 years, which I am informed and advised has been, and especially in latter years, an exemplary record. Those matters have already been brought to the attention of the court.
>
> "I have nothing further to say."

Whereupon the trial judge interrogated the prisoner concerning his record and especially his conduct while an inmate of Michigan penal institutions. We respectfully invite the Court to read from the transcript aforesaid the state-

ment made by the trial judge assigning his reasons for imposing upon the petitioner a sentence of 6 months to 15 years, especially the following:

"Every court probably has its own rules in imposing sentence and its own yardsticks. This court gives primary consideration always to the protection of society, that is the first thought: how can society be best protected? It gives secondary consideration to the probability of rehabilitation and reform of the individual, of the defendant. Thirdly, this court approaches the sentence from the aspect of punishment. In the opinion of this court, the first two elements come first and punishment third.

"Considering your case, and considering the case from the aspect of protection of society and your probability of rehabilitation and reform, it appears that your closest relatives are your parents, and that the marital and home situation is, and for a considerable time past, has been disturbed; that is, your father and mother are divorced, it is not a happy home. There is no absolute assurance of employment for you at this immediate time. You have been 15 years out of the free world, and the world has changed a lot in the past fifteen years. Also, in that 15 years, whether from your fault or from the fault of others, your contacts in prison have not been completely wholesome. The men that you met there and of necessity associated with, are usually not the highest type of citizens.

"You have assured the court that your future intentions in a free world are of the best, but assuming that this is true, assuming that you have the best intentions and resolutions, there would in the opinion of

the court, be grave danger not only to society but to yourself to immediately avail you unsupervised relief in a free society.

"There are two forms of supervision outside of barred supervision—there are two forms of supervision in the outside world that are available in your case, probation and parole. Due to the nature of the offense and the whole background of this case, the court considers that parole would be the most effective form of supervision in adjusting you to free, civilian life."

2. On page 5 of the petition for certiorari, line 3 and continuing to the close of the paragraph, we find the following inaccurate statement concerning the habeas corpus proceedings in the court below:

"Thus, notwithstanding the summary nature of habeas corpus in Michigan (Mich. Stat. Ann. Sec. 27.2279), as elsewhere, and the mandate of Michigan's laws, that the court shall immediately after the return of the writ proceed to examine into the facts (Mich. Stat. Ann. Sec. 27.2269), it took petitioner almost one year to secure adjudication of his federal rights by Michigan's habeas corpus procedure."

This reflection upon Michigan's procedure and her highest court is wholly unwarranted.

The writs of habeas corpus and ancillary certiorari were granted by the Supreme Court of Michigan on the 16th day of February, 1948; return to the writ of certiorari was duly filed on the second day of March and the return to the writ of habeas corpus was made on the 10th day of that month.

It was not until the 12th day of August, 1948, approximately 5 months later, that local counsel for petitioner managed to get around to the task of filing his brief in support of the petition for writ of habeas corpus; on the 14th day of August, 1948, petitioner's counsel filed a supplemental brief, and on the 17th day of that month he filed a further supplemental brief, and finally on the 14th day of September, 1948, he filed a second supplemental brief.

It was not until the 25th day of September, 1948, that the defendant in compliance with the practice of the Supreme Court of the State of Michigan filed with the clerk of that tribunal a notice of argument. Whereupon on order of the Supreme Court, the cause was set down for hearing on oral argument for the 14th day of October, 1948, together with other state cases, scheduled for that date.

On that day the cause was argued in open court. Counsel for the petitioner was requested by the Chief Justice to file with the Clerk of the Court 7 additional copies of his several briefs and his attention was directed to the fact that because he had filed only one copy of his brief the Court had been considerably inconvenienced.

Whereupon counsel for the petitioner assured the Court that as soon as convenient he would file printed briefs.

This promise was made on the 14th day of October, but the printed brief was not filed with the Court until the 22d day of November, 1948.

The Court's opinions in the *De Meerleer* and *Doelle* cases were handed down on the 17th day of December, 1948, the Court requiring only two months to decide these very important questions.

3. It is further said, petition, p. 5, 2nd paragraph:

> "The court's opinion dismissing habeas corpus expressly rejects petitioner's constitutional claims without attempting to discuss them."

It is true that the Supreme Court of Michigan did not discuss the federal questions now presented in the excellent brief prepared by counsel for the petitioner, but this is probably due to the fact that while such questions were raised in the petition for habeas corpus filed in the court below, and although they were mentioned in petitioner's brief, counsel did not particularly stress them, as is evidenced by the statement of "question involved" which we find in the printed brief filed by local counsel in the court below:

> "Where one is erroneously convicted of a major crime and enters upon service of the sentence then imposed, but who subsequently upon retrial is acquitted of the major charge and convicted of a lesser included offense, is such a Defendant entitled to his discharge from prison when he has served the maximum sentence prescribed by law for the offense of which he was convicted upon retrial?"

And the failure of the court to discuss such federal questions, as now presented, may also be due to the fact that no decisions of this Court were cited in any of petitioner's briefs.

Nor can we accept at full face value the argumentative assertions set forth at the close of counsel's "Statement", petition, top of page 6, to the effect that petitioner has been imprisoned "on account" of the homicide involved, continuously for a period of 17 years, and is subject to 14

years additional imprisonment—a total of approximately 31 years—although Michigan's law fixes a 15-year term of imprisonment for manslaughter, the crime for which he was convicted.

The emphasis in such statement is on the maximum of 15 years prescribed by the Michigan penal code rather than upon the minimum of 6 months which was fixed and recommended by the trial judge in the exercise of judicial discretion vested in him by the indeterminate sentence provisions of Michigan's code of criminal procedure (note 3). And it should also be noted that petitioner has never applied to the parole board for release under proper supervision, nor has he sought from the chief executive a pardon or commutation of sentence, Mich. Const. 1908, art. 6, § 9.[15]

5

Manner in which federal questions were raised.

While petitioner in his application for *habeas corpus*, alleged that the sentence of January 8, 1948, denied him certain federal constitutional rights, and although such claims were made in petitioner's brief in the court below, they were not strongly urged, and the controversy turned mainly on other points.

It is our position that the case was decided on non-federal grounds adequate to support the opinion of the court below, *viz.*, that the question was for the legislature to determine, and that the length of imprisonment for a specific felony

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[15]

Unfortunately, since they do not appear of record, many important factors of this intricate problem cannot be presented in detail to the Court. See, however, Francis v. Resweber, 329 U.S. 459, at 480, note 2.

is not subject to judicial supervision unless the sentence imposed violates the provisions of the statutes.

We also note that the petitioner has not drawn in question the constitutional validity of applicable Michigan statutes, as construed and applied by the court below.

6

The Argument.

Introduction:

The three points urged in petitioner's brief, *viz.*, (1st) that the "double punishment" implicit in the sentence violates those fundamental notions of justice dictated by the traditions and conscience of the American people, and assimilated in the due process clause of the 14th Amendment, (2d) that such a sentence violates the spirit and intent of the prohibition of "double jeopardy" in the 5th Amendment applicable against state action by force of the 14th Amendment, and (3d) that such a sentence, because it imposes "double punishment" or subjects to "double jeopardy" for the same offense, inflicts "cruel and unusual punishment" contrary to the spirit of the 8th Amendment,—these several points when together examined, boil down to the single claim of "double jeopardy".[16]

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[16]

The argument, in short, is that such "double jeopardy" or "double punishment" not only runs contrary to the very spirit and intent of the 5th Amendment, it also offends those "immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard" without violating the due process clause of the 14th Amendment; and that such "double punishment" or "double jeopardy" constitutes "cruel and unusual punishment" within the prohibition of the 8th Amendment.

Question One

Did the sentence of 6 months to 15 years, pronounced by the trial judge in exercise of sound discretion and in accordance with Michigan law, deprive petitioner of his liberty without due process of law?

Counsel states, p. 8:

> "Michigan has expressly held that although petitioner has already served more than the maximum term provided by her laws for the offense of which he was convicted, he must serve an additional term, up to fifteen more years, for the same offense".

This, however, is not precisely what the Michigan court held, and counsel overlooks entirely the fact that under the terms of Michigan's indeterminate sentence law (note 3), the trial judge, in exercise of sound judicial discretion, after due consideration of the pertinent facts, including the period of time theretofore served on a void sentence, fixed the minimum term at merely 6 months, and recommended that upon its expiration the petitioner be released on parole under close supervision.

It is then urged by petitioner that Michigan has thus offended "a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental", *Snyder v. Massachusetts,* 291 U.S. 97, 105, one of those "immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard", *Holden v. Hardy,* 169 U.S. 366, 389. It is also said she has violated "the very essence of a scheme of ordered liberty", *Palko v. Connecticut,* 302 U.S. 319, 325, and that it is impossible to square her action "with the

fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land' ", *Herbert v. Louisiana*, 272 U.S. 312, 316-317.

The trouble with such overstatements is that in the decisions cited in their support, this Court did not apply the foregoing principles of constitutional law to a situation remotely resembling that now confronting them.

In *Snyder v. Massachusetts, supra,* 291 U.S. 97, the Court upheld a jury-view of the scene of the crime, though held in the absence of the accused, leaving the Commonwealth "free to regulate the procedure in its courts in accordance with its own conception of policy and fairness", unless in so doing it offends some of the fundamental principles noted above.

The phrase "immutable principles of justice" was used *obiter dictum* in *Holden v. Hardy, supra,* 169 U.S. 389, when the Court declined to define with precision the term "due process of law" as limiting the police power of a State, and sustained the validity of Utah's eight-hour labor law as against the claim that it violated the due process clause of the Fourteenth Amendment.

Although petitioner seeks to apply the fundamental principles announced for the Court by Mr. Justice Cardozo in *Palko v. Connecticut, supra,* 302 U.S. 319, 325, the decision itself is squarely against the contention of his counsel.

In the *Palko* case, under a state statute allowing appeal by the State in criminal cases, when permitted by the trial judge, for correction of errors of law, a sentence of life imprisonment, on a conviction of murder in the second de-

gree, was reversed. Upon retrial, the accused was convicted of murder in the first degree and sentenced to death. This was held consistent with due process of law under the Fourteenth Amendment.

And in *Herbert v. Louisiana, supra,* 272 U.S. 312, the Court held, *inter alia,* that a decision of a state supreme court construing state penal statutes in such wise as to impose a heavier sentence than would be valid under the construction advanced by the accused is not reviewable here as a denial of due process of law, under the Fourteenth Amendment, 272 U.S. 316.

Finally, pp. 9-10, counsel cites aproximately 13 cases decided by State courts, to support his claim that "the judgment of the American conscience and tradition" is that a person who has served "on account" of a criminal act, the full measure of punishment provided by his sovereign for that act, should not thereafter suffer further extensive punishment for the same act. But the numerous decisions listed in petitioner's brief, are based upon legislative enactments, or local concepts of fairness rather than upon "the judgment of the American conscience."

E.g., *In re Phair,* 2 Cal. App. 2d 669, 38 P. 2d 826, the only question involved was a sentence deemed to be excessive under § 19a of the California Penal Code. The defendant had first been sentenced to the county jail for 2 years for misdemeanor, but the appellate court ordered him to be *resentenced* for the reason that the foregoing section of the code limited the sentence to a period of one year. The court held he was entitled to release on habeas corpus because at the time of the second sentence he had

been in the county jail under the first sentence for more than one year, saying, 2 Cal. App. 2d 670:

> "His imprisonment has been one continuous imprisonment under commitment for misdemeanor and the year having expired, he is entitled to the writ ordering his release".

Cf. *People v. Gilbert*, 163 Mich. 511, involving a somewhat similar situation.

In *In re Leypoldt*, 32 Cal. App. 2d 518, 90 P. 2d 91, it appeared in *habeas corpus* proceedings that a sentence of 6 months in the county jail for petty theft, imposed on the petitioner by a justice of the peace; had been held void by the superior court under a statute of California (Stat. 1921, page 1615) vesting in the justice's court a mandatory duty to sentence such a person to imprisonment in the county road camp, and the superior court had remanded the prisoner to the justice's court for *resentence*. "He appeared before the latter court . . . and was sentenced to imprisonment for three months in the county road camp, under the provisions of the statute mentioned above", 32 Cal. App. 2d at 519. It was held that the petitioner was entitled to his liberty after serving a term of six months, irrespective of whether he was confined in a county jail or a road camp, the court saying:

> "To allow the second sentence here its full effect would result in the infliction of a punishment which would be *in excess of the jurisdiction of the justice's court*, and would be manifestly unfair and unjust. For instance, a defendant who has served five months of a void sentence, may then be *resentenced* to serve six months. Thus, he would actually be imprisoned for eleven months on a misdemeanor".

In our printed brief filed in the Michigan Supreme Court in this cause, we collated and considered numerous sister-state decisions supporting De Meerleer's position (though not in constitutional grounds), pp. 8-14, and we also presented and considered sister-state authorities sustaining our position, then asserted, that the trial court in the case of De Meerleer, was without power to credit on the new sentence imposed after retrial, the time served on the old.[17]

In order to expedite the filing of this printed brief, and to obviate necessity of printing what was said in the briefs filed below, we are depositing with the clerk of this Court 10 copies of our brief which was presented to the Michigan Supreme Court.[18]

Our position on this particular question may be stated quite shortly:

Counsel for petitioner is firmly convinced and he vigorously urges, without any qualification, that a terrible injustice has resulted from the sentence last imposed upon De Meerleer, and that Michigan is guilty of denying him due process of law, contrary to the Fourteenth Amendment. We cannot share that view.

First: As heretofore observed, the Michigan penal code, § 321, fixes the maximum term of imprisonment at 15 years upon conviction of manslaughter, under the indeterminate sentence law of that State (note 3), such a maximum term

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[17]

In the court below, so far as the State was concerned, the question presented was strictly one of judicial power.

[18]

Attached to the printed brief as an appendix is a copy of the State's brief in the case of Doelle.

is mandatory, and the trial judge is powerless to alter or reduce it or to credit thereon time served on account of a prior sentence which upon appeal of the defendant has been set aside or reversed by a higher court. His sole duty when pronouncing sentence, insofar as the maximum is concerned, ends when he announces that the maximum to be served is 15 years; any other maximum term would be void, *Canfield v. Commissioner of Pardons and Paroles*, 280 Mich. 305. Hence, we again assert, the fault, if any, lies in the statutes of Michigan, the validity of which under the Constitution of the United States has not here been challenged. .

Second: Despite his extravagant claims of denial of due process, the petitioner in this particular case, when all of the facts and circumstances have been considered, has not suffered an injustice, nor is there anything on the face of the record to indicate that any State law-enforcing officer, much less the trial judge, or the members of the State Supreme Court, is vindictive or malicious in this matter.

The petitioner has not been wholly without remedy in the premises:

1. It is our considered thought that in view of the peculiar circumstances of this case, contemplating the brutal nature of the crime which the petitioner committed, and his instability at the time, as well as his utter disregard of the rights of others, he was as a matter of fact extended clemency when the trial judge allowed the jury to consider the theory of manslaughter.[19]

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[19]

In saying this, we do not go outside the record: see the printed record in 329 U.S. 663, October Term 1946, No. 140, as well as the transcript of sentence proceedings, attached to the trial judge's return to the writ of certiorari in the court below.

2. For the same reason, it is quite clear to us that in finding the petitioner guilty of manslaughter rather than murder in the first degree, the members of the jury exercised their traditional and historic right to disregard the actual facts and extend mercy by bringing in such a verdict as would result in reduction of punishment.

3. The trial judge extended mercy, for as a matter of fact he gave serious consideration to the circumstance that the convict had served over 14 years on the prior judgment and sentence for first degree murder, set aside by this Court, 329 U.S. 663, because the proceedings were fundamentally unfair. And, having so considered this peculiar circumstance, the court fixed the mimimum term at 6 months.

Not only did the trial judge fix the mimimum term at 6 months, he also strongly recommended that upon termination of this short period of time the petitioner be released on parole subject, however, to necessary supervision.

The trial judge, as disclosed by the transcript of the proceedings when sentence was imposed, entertained the sound view that in fixing the minimum term a judge should give consideration, first, to the public safety, second, to the rehabilitation of the prisoner, and last, and least of all, to punishment of the criminal. We respectfully submit that in exercising his judicial discretion, and in determining the minimum term to be served in this cause, the trial court was extremely lenient, and that he was correct in holding that this particular defendant should not be restored to a free society without strict supervision under the parole laws of the State of Michigan.

We respectfully submit that in imposing 6 months imprisonment upon the petitioner, and subjecting him to the parole laws of the State, the trial judge did not abuse his

discretion, much less did he deny the petitioner due process of law. There is nothing about the sentence imposed, under the laws of the State of Michigan, which should shock the conscience of the American people.

Since the remaining questions involve "technical aspects of double jeopardy as enshrined in the Fifth Amendment", 329 U.S. 469, and the petitioner's claim that his punishment is "cruel and unusual" (8th Amendment), the argument may be quickly summarized.

Question Two

Is the prohibition of double jeopardy in the 5th Amendment applicable against state action by force of the 14th Amendment, and is the petitioner subjected to be twice put in jeopardy?

Under decisions of this Court, presently cited, the Fifth Amendment to the Constitution of the United States, prohibiting any person being "subject for the same offense to be twice put in jeopardy", applies only to the procedure and trial of causes in the federal courts and is not, therefore, in any event, available to the petitioner in this cause, by force of the Fourteenth Amendment.

Brantley v. Georgia, 217 U.S. 284;

Palko v. Connecticut, 302 U.S. 319;

Francis v. Resweber, 329 U.S. 464;

Cf. *Adamson v. California*, 332 U.S. 46, 52, for discussion of the broader subject here involved.[20]

[20]

For law review of this case: January 1949 Yale Law Journal, p. 268.

"Unlike the fundamental right to assistance of counsel granted by the 6th Amendment to the Constitution, the right not to be twice placed in jeopardy for the same offense granted by the 5th Amendment, is not generally regarded as a member of this family of fundamental rights coming within the scope and protection of the 14th Amendment, and from which is derived Federal power to correct state process".

Amrine v. Tines, 131 F. 2d 827, 833.

Furthermore, one who obtains reversal of a conviction and sentence on a former trial, and who himself invokes the action of the higher court which results in a further trial, is not placed in second jeopardy within the meaning of the Constitution,

Trono v. United States, 199 U.S. 521, 533;

Stroud v. United States, 251 U.S. 15.

Poor Stroud, in the case last cited, unlike the petitioner who was given a minimum sentence of 6 months, with the prospect of quick parole, was sentenced to be hanged when convicted after his second trial. Cf. *Palko v. Connecticut*, 302 U.S. 319, where the same unhappy fate overtook the petitioner after reversal of a life-term sentence upon appeal by the State.

See, also:

McCleary v. Hudspeth, 124 F. 2d 445; certiorari denied, 316 U.S. 670; October Term, 1941, No. 1043;

f. *Levine v. Hudspeth,* 127 F. 2d 982; certiorari denied, 317 U.S. 628; rehearing denied, 317 U.S 707;

State v. Stroemple and Skiba, 355 Mo. 1147; certiorari denied, 331 U.S. 857, 332 U.S. 849.

Question Three

Has the petitioner been subjected to "cruel and unusual punishment" prohibited by the 8th Amendment perforce the 14th?

Petitioner's argument seems to be that since "double jeopardy" results in "double punishment", the result is "cruel and unusual punishment" forbidden by the 8th Amendment, by force of the Fourteenth Amendment against the States. As we view it, there is no perceptible distinction between this particular question and the problems involved in the first two questions here discussed. If this Court should find that the sentence imposed after the second trial, violates the due process clause of the Fourteenth Amendment (though this we deny), it adds nothing to the petitioner's contention if the sentence be dubbed "cruel and unusual punishment", and if the Court should hold that due process has not been violated, after applying the principles of the case of *Palko, supra,* that would seem to end the matter without any necessity for considering the question of "cruel and unusual punishment".

Question Four

Is the judgment of the court below, based upon a non-federal ground adequate to support it?

We respectfully invite the Court to reexamine our "Counter-Statement on Jurisdiction", from which (we think) it clearly appears that an affirmative answer to the foregoing question is in order.

The judgment of the Michigan Supreme Court rests squarely upon the statutes of this State.

Under our penal code, and according to the terms of our indeterminate sentence law, a trial judge confronted by a situation such as this, is utterly powerless to reduce the maximum prison term prescribed by law, *Canfield v. Commissioner of Pardons and Paroles,* 280 Mich. 305, or to deduct therefrom the number of years served under a previous sentence held void by a court of review, or, because of such prior servitude, to enter his judgment *nunc pro tunc.* Michigan law, however, leaves to his discretion the minimum penalty to be imposed, and he is at liberty (if not duty-bound, as we think) when determining the minimum number of months or years to be served, to take into consideration the period of time already served under the vacated judgment.

So much for the duty of the trial judge toward the defendant, but it is our position that he is also at liberty to consider the nature of the crime, the character of the defendant, his past record, and other facts bearing upon the problem of his restoration to a free society and whether, if fully restored to such liberty, he is liable again to commit the same type of criminal offense. After all, in exercising this discretion, the trial judge owes a primary duty to the protection of the public.

II

With respect to filing to transcript of petitioner's testimoney, and the matter of bail.

1. We have filed with the clerk our request for permission to document this brief with a transcript of the testimony given by the petitioner in his own defense when convicted of manslaughter, and we are requesting him to present such request to the Court when the petition for certiorari is submitted.

We are, however, embarrassed by failure to procure from the court reporter the full transcript of such testimony, and we have at our disposal only a transcript of the cross-examination of this witness.[21]

We therefore modify our request by asking leave to file such a transcript at a later date; and if the Court has granted certiorari, to file the transcript in connection with the final hearing.

The testimony in question was heard by the trial judge, and he gave it consideration when he passed sentence. We do not know how this Court can fully understand the facts considered by the trial judge in fixing the minimum penalty, or determine whether the trial judge abused his discretion, unless it have before its members the petitioner's own version of the crime.

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[21]

The court reporter is in California and it is doubtful that we will receive the transcript before the time limit for filing this brief expires.

In filing such a transcript we would not depart wholly from the record. The facts and circumstances of the crime were related by the witnesses at the former hearing, and under stipulation with counsel in the court below the record in the case of *People v. De Meerleer (De Meerleer v. Michigan)* was deemed part of the record in the habeas corpus proceedings (see calendar entries). From that record the Michigan Supreme Court, 313 Mich. at 550-551, drew certain undisputed facts, 329 U.S. at 664 (wherein it is stated the facts are not in dispute), as follows:

> "The people then called three eyewitnesses, each testifying, in substance, that Scott and De Meerleer drove into a gas station, where the attendant filled their car; they then secured some pop and candy bars and, without paying for the gasoline or candy, shot the attendant Brown, and drove away. Brown died a few minutes thereafter".

The trial judge in the second case, following petitioner's conviction of manslaughter, said in part:

> "Under your own story, and making due allowance for your comparative youth—you were 18 when this offense was committed—as I say, under your own story, and making allowance for your comparative youth, the fact remains that you acknowledged in this court that in effect you took a human life and the life of a man who was apparently an honest, God-fearing citizen, for candy and gasoline. That is under your own story, and it is not a pleasant thing to contemplate".

We respectfully submit that in fairness to the State of Michigan, as well as to the petitioner, the latter's own story of the crime which he committed, the version of the event

which was considered by the trial judge in imposing sentence (the validity of which is here drawn in question), should be made available.

2. Meanwhile, after we had filed with the clerk the foregoing request, the petitioner moved the Court to be enlarged upon recognizance, meaning, we take it, that he be freed without bail pending these proceedings.

This we respectfully oppose upon the ground that the petitioner is not a good rsik for admission to freedom on his own recognizance, or on bail. We will file separate typewritten affidavits to bear this out.

In this connection, we would like to file the transcript of petitioner's cross-examination, to show the character of the crime, and as evidence of the petitioner's instability, but we leave this to the discretion of this Court. We have, therefore, deposited the certified transcript with the clerk and have thus made it available to the Court, to be considered or rejected as they deem fair, submitting, however, as heretofore urged, that petitioner's version of the criminal transaction in which he engaged should be taken into account in passing upon the matter of enlargement on bail or recognizance.

We respectfully submit that a prisoner of this type, *who has committed a crime of violence,* should not even temporarily be restored to a free society, pending review, without any supervision whatsoever.

III

Conclusion.

The State of Michigan has evinced no vindictiveness or malice in this cause, and she does not desire to punish this man any further than may be necessary for the protection of her citizens. Punishment, or the suffering of the offender is the very last factor to be considered in fixing penalties for the commission of crime. Protection of the public from ruthless killers comes first of all, then the rehabilitation of the offender, finally the element of punishment.

Michigan has an indeterminate sentence law, and a parole law, which involve each of the foregoing factors, and under that law, had the petitioner applied for parole, and had he evinced an intent to behave himself in a free society, or had he shown any disposition to yield to necessary supervision during parole, and until he had become rehabilitated, there is no doubt that by now he would be a free man.

He also has the remedy of pardon, or commutation or sentence, the power residing exclusively in the Governor.

But he has availed himself of none of these remedies, choosing, as he has a perfect right to do, this attack upon the validity of the sentence which he now serves.

We sincerely hope we have not developed the prosecutor's complex, but we cannot accept the theory that in imposing upon this criminal a minimum prison term of 6 months, to be followed by parole and supervision, the trial judge

abused his discretion. Much less can we join in the view that such sentence, all facts being considered, shocks the conscience of the American people.

It is respectfully submitted that the petition for certiorari should be denied.

Respectfully Submitted,

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